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No.

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In the Supreme Court of the United States

October Term, 1983

ANDREW BERES, et al.,
Petitioners,

vs.

HOPE HOMES, INC.

and

CITY OF TALLMADGE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Whether a state court violates the Due Process Clause of the 14th Amendment of the United States Constitution when said court redefines the common and ordinary meanings of the words "business", "private residence purposes", and "family" as these words occur in a restrictive covenant.

2. Whether the redefinition by a state court of the common and ordinary meanings of the words "business" and "family" appearing in a restrictive covenant constitutes a taking of property necessitating the payment of just compensation.

3. Whether enforcement of state legislation which permits a less restrictive use of property than permitted in a restrictive covenant on the property violates the Contracts Clause in Article I, Section 10 of the United States Constitution.

LIST OF ALL PARTIES

The Petitioners are Andrew Beres, Irma A. Beres, Charles V. Blair, Janis J. Blair, Donald E. Ramsey, Kathryn L. Ramsey, Lawson G. Wideman and Peggy J. Wideman.

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The Petitioners, Andrew S. Beres, Irma A. Beres, Charles V. Blair, Janis J. Blair, Donald E. Ramsey, Kathryn L. Ramsey, Lawson G. Wideman and Peggy J. Wideman, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court for the State of Ohio entered in this proceeding on the 8th day of June, 1983.

OPINIONS BELOW

The orders of the Supreme Court for the State of Ohio appear in the Appendix hereto as do the opinion of the Court of Appeals for the Ninth Judicial District for the State of Ohio and the opinion of the Common Pleas Court of Summit County, Ohio.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on the 8th day of June, 1983, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTION AND STATUTES INVOLVED

The Constitutional provisions involved in this case are:

Constitution of the United States, Article I, Section X

> No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.
>
> No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
>
> No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or com-

pact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

Constitution of the United States, Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Constitution of the United States, Amendment XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Ohio Revised Code Sections 5123.18 and 5123.19 can be found in the Appendix at pp. A14 and A17.

STATEMENT OF THE CASE

Petitioners are residents of the City of Tallmadge, Ohio. Their homes are located within an area known as the Hilltop Acres Allotment. This allotment was made subject to a restrictive covenant which was made a matter of public record in accordance with the laws of the State of Ohio. Those restrictions, in pertinent part, provided as follows:

> No business, commercial, sales, manufacturing or otherwise shall be conducted upon any lot. The premises shall be used for private residence purposes only, and only single-family residences shall be erected or maintained, and only one residence building upon each lot, except that on Lots Number 4 and Number 19, one who is the owner of an entire lot, may erect and maintain thereon, one additional single-family residence building if the same be located not less than 300 feet from the nearest highway.

The Respondent, Hope Homes, Inc., entered into negotiations for the acquisition of a property known as Lot No. 51 of the Hilltop Allotment. Hope Homes, Inc., who is a Not For Profit Corporation organized and existing under the laws of the State of Ohio, is actively involved in the care and treatment of individuals with developmental disabilities ranging from moderate to severe mental retardation. This corporation desired to acquire the property for the installation of a residential care facility for six (6) adult women with this type of disability.

Prior to culmination of the negotiations, the officials responsible for the acquisition of the house located on Lot No. 51 of the Hilltop Allotment had actual knowledge of the existence of the plat restrictions associated with

this allotment. In addition, pursuant to recordation of this plat with the Recorder's Office of Summit County, Ohio, the corporation is deemed to have constructive knowledge of this restriction.

This home must comply with the licensure requirements of the State of Ohio. In order to so comply as a "family home", it is necessary that the facility provide room and board, personal care, habilitation services and supervision in a family setting for not more than eight (8) persons with developmental disabilities. It is further necessary that the operator of such a facility maintain records of the medical treatments accorded the residents, record unusual occurrences such as accidents, injuries, and seizures, keep a daily census of admissions, discharges and other releases and record the progress made on a ninety (90) day basis of the residents' individual habilitation plan. In order for this house to comply with the Ordinances of the City of Tallmadge and with the licensure requirements with the State of Ohio, substantial changes in the heating, plumbing and electrical equipment will be necessary.

Hope Homes, Inc. will receive reimbursement for its expenses incurred in the care and treatment of the individuals occupying this facility. This reimbursement will include expenditures for the maintenance of the property, food for the residents and depreciation of the physical structure. It will also include salaries of the staff which are currently contemplated to include a regular manager and a weekend manager.

Under the Ordinances of the City of Tallmadge, the property is located within an R-3 Residential District. The permissible uses in such a District are single-family residential dwellings and accessory uses provided such uses

are incidental to the principal use and do not include any activity conducted as a business.

In February, 1981, Hope Homes, Inc. applied to the Respondent, City of Tallmadge, for a Conditional Zoning Certificate. This permit was granted by the City of Talmadge on the 9th day of April, 1981. From that adverse decision, Appellants filed an appeal to the Court of Common Pleas, Summit County, Ohio, and in addition, sought a declaratory judgment determining that the proposed facility would be violative of the plat restrictions.

In a Trial of this proceeding, each of the Petitioners testified that part of the consideration which they understood they were receiving from the acquisition of lots within the allotment, was the ability to maintain their neighborhood as a single-family private residential area without the incursion of other types of uses. All further testified that the value of their property would be reduced as a result of the operation of this facility within their allotment.

The Trial Court issued its decision determining the validity of the issuance of the Conditional Zoning Certificate and further determining that the proposed use of the premises by the Defendant, Hope Homes, Inc., was a proper use of said premises and not in violation of any deed or allotment restrictions that cover the premises.

Thereafter, an appeal was made to the Court of Appeals for the Ninth Judicial District of the State of Ohio. The Court affirmed the decision of the Trial Court stating:

> "As long as the structure in question is maintained, physically, as a private residence and, as long as it is used and occupied by a group of persons living to-

gether as a single household unit, it, by existence and use, is not in violation of restrictions running with the land upon which it is located. It follows that as long as the use is devoted to a family household unit, such use is 'private.' It follows from the elements thereof that a household unit is in and of itself private as opposed to a multi-family use or an out-and-out commercial enterprise. Appellant argues that in spite of the family setting, the operators of this home must provide annual accounting statements, provide reports, provide supervisors and care paid by the State and Federal government. This is all true, but is it collateral to the family housekeeping unit? It does not make that unit non-private any more than the resident, engaged in business, who does his bookkeeping at home." See pages A6-A7 of Appendix hereto.

From that adverse decision, Petitioners effectuated a timely appeal to the Supreme Court for the State of Ohio. The Supreme Court of the State of Ohio denied certiorari and from that adverse determination, Petitioners have effectuated the within Petition.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW, UNLESS REVERSED, DESTROYS THE VALUE OF RESTRICTIVE COVENANTS AND CREATES UNCERTAINTY IN REAL PROPERTY LAW WHERE PUBLIC POLICY HAS TRADITIONALLY REQUIRED EXACTITUDE.

The State of Ohio in this case has destroyed a private restrictive covenant for property use in violation of two (2) United States Constitutional Principles: Due Process and the Fifth Amendment prohibition of taking property without just compensation, applied to the States through the Fourteenth Amendment; and, the prohibition of impairment of contract found in Article I, Section 10 of the United States Constitution. If this decision is permitted to stand, a valuable property right—the right to restrict the use of one's property—will be destroyed. Public policy has traditionally required exactitude in the regulation of property rights. The growing confusion among State jurisdictions regarding the validity of this property right cries out for guidance from this Court.

The Fourteenth Amendment forbids any State to "deprive any person of life, liberty or property without due process of law."

Under Ohio Law, the Petitioners herein have an intangible interest appurtenant to their property, namely the right to enforce restrictive covenants intended for their benefit. *Berger v. Van Sweringen Company*, 6 Ohio St. 2d 100 (1966). Such right was created and established at the time the restrictive covenant was placed of record on the recorded Plat for the properties contained within the allotment.

At the time the restrictions were recorded, the words "business" and "family" had meanings which were well understood within the community of Tallmadge, Ohio, and the United States in general. Such meanings were those commonly and ordinarily associated with these words. This Court has addressed a similar issue with respect to the meaning of "family." Mr. Justice Powell, announcing the judgment of the Court in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), stated:

> "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and) solid recognition of the basic values that underlie our society' *Griswald v. Conn.*, 381 U.S. at 501, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (Harlan, J. Concurring). See generally Ingraham B. Wright, 430 U.S. 651, 672-674, 51 L. Ed. 2d 711, 97 S. Ct. 1401 nn 41, 42 (1977); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J. Concurring); *Lochner v. New York*, 198 U.S. 45, 76, 49 L. Ed. 937, 25 S.Ct. 539 (1905) (Holmes J., Dissenting). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with the parents and children has roots equally venerable and equally deserving of constitutional recognition."

This Court also commented on the traditional understanding of "family" in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1976). The court stated that "the usual understanding of 'family' implies biological relationships". *Id.* at 843. The Court continued:

> "A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases . . . .
>
> Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it place in 'promot[ing] a way of life' through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972) as well as from the fact of blood relationship."

Id. at 843, 844.

The Court also noted an important distinction between foster families and natural families. The liberty interests of natural families have their source "not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition'." *Id.* at 845. A foster family, however, has no such liberty interest since the relationship has origins "in an arrangement in which the State has been a partner from the outset". *Id.* Like the foster family relationship, the group home of Respondent has origins in an arrangement in which the State has been a partner from the outset. The very existence of group homes for the developmentally disabled was created and is controlled by Ohio Statutory law. See

Ohio Revised Code Ann., Sections 5123.18, 5123.19 (Baldwin). Under the rationale of *Smith, supra,* Respondent is not entitled to the same rights as a natural family possesses.

The Court of Appeals for the Ninth Judicial District of the State of Ohio in the decision below refused application of a traditional meaning of "family". Instead, that Court determined that,

> "As long as the structure in question is maintained, physically, as a private residence and, as long as it is used and occupied by a group of persons living together as a single household unit, it, by existence and use, is not in violation of restrictions running with the land upon which it is located. It follows that as long as the use is devoted to a family household unit, such use is 'private'. It follows from the elements thereof that a household unit is in and of itself private as opposed to a multi-family use or an out-and-out commercial enterprise."

As a result of this definition, consanguinity or affinity becomes unimportant and the fact that the unit is created for the purpose of habilitating and teaching and training developmentally disabled life skills, becomes unimportant. Paid employees, periodic reporting requirements and reimbursement from the State and Federal Government to conduct the program likewise becomes unimportant. As a consequence, what would appear to clearly be a business under a traditional view of that word, suddenly becomes a "family" use.

Petitioners submit that such a radical transformation of the ordinary meaning of the words "family" and "business" constitutes a taking of their property right to restrict the land within their allotment to a private residential, single family use.

This action by the State Court effectuated a taking of property to no lesser extent than a similar legislative action would have. This Court has recognized that such court actions do constitute State action activating the protection of the due process clause of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

This radical reinterpretation of the common and ordinary meaning of the words of this plat restriction constitutes a taking of property without just compensation. Such a right to restrict usage within the allotment was a valuable property right. This right has been taken without any payment to the holders of that property right. Such action is violative of the Fifth Amendment to the Constitution of the United States as made applicable to the State of Ohio under the Fourteenth Amendment to the Constitution.

This Court, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), recognized that the Fifth Amendment prohibition against taking property without just compensation is qualified by the police power. The present case, however, does not involve the police power of the State of Ohio. As in *Mahon, supra*, this case involves a private home with a private contractual right included in the deed of land. As stated in *Mahon*:

> "This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case, *Rideout v. Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference."

Id. at 413.

If the public interest does require the taking of private property for homes for the developmentally disabled, the State may exercise its power of eminent domain with just compensation. Judicially destroying values incident to property, however, where the police power is not involved, is surely outside of the implied limitation on the free use of one's property. "(O)bviously the implied limitation must have its limits, or the contract and due process clauses are gone." *Id.*

In addition to violating substantive due process, the State of Ohio has violated the Contracts Clause of the Constitution.

As noted above, the restrictive covenant involved in this case contemplated a family use for the property purchased by Respondent. Under Ohio Law, property owners such as Petitioners have a right appurtenant to their property to enforce restrictive covenants intended for their benefit. *Berger v. Van Sweringen Company, supra.* This property interest is attained through contract rights included in the property deed. Private purchasers of property are bound by such contract terms in their deeds. If the State of Ohio impairs these contract obligations between private parties, the Contracts Clause in Article I, Section 10 of the United States Constitution has been violated. By enforcing municipal zoning provisions which abrogate the contract obligations in Petitioners' and Respondents' restrictive covenants, the State has judicially enforced a legislative impairment of contracts, thus violating the Constitution of the United States.

Numerous decisions by this Court have held that a Federal question is presented where a State's Court enforces a legislative enactment which impairs prior private contractual obligations. See *Willoughby v. Chicago,* 235

U.S. 45 (1914), *Lehigh Water Company v. Easton*, 121 U.S. 392 (1887), *Chicago Life Insurance Company v. Needles*, 113 U.S. 574 (1885). As noted in *Cross Lake Shooting, etc., Club v. Louisiana*, 224 U.S. 632, 638, 639 (1912):

> "(W)hen a state court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law."

Additionally, contracts are made with reference to law existing at the time of contracting and cannot be impaired by it even if the law has been given a changed construction by the State Court. *State of Washington v. Maricopa County, Arizona, C.C.*, 152 F.2d 556 (9th Cir. 1945), *cert. denied* 327 U.S. 799 (1946).

In the case at bar, the record shows that the restrictive covenant in question was placed on the property many years before the City of Tallmadge defined a family as:

> "One or more persons occupying a premises and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished by a group occupying a boarding house, lodging house, or hotel, as herein defined."

In finding that the restrictive covenant in question limited residents to *any* group of persons living together as a single household unit, the Ohio Courts did not apply the legal standards in operation at the time the restrictive covenant was executed as required in *State of Washington*

v. Maricopa, supra. Rather, the Court relied upon *Carroll v. City of Miami Beach,* 198 So. 2d 643 (Fla. App. 1967) and *Garcia v. Siffrin,* 63 Ohio St. 2d 259 (1980).

The *Carroll v. City of Miami Beach* Court specifically noted that the definition of family in the ordinance it was construing—which included any persons living together as a single housekeeping unit—was not "in accordance with the meaning commonly ascribed to it by the public in general." 198 So. 2d at 645. The *Garcia v. Siffrin* decision, ironically, held that a group home for developmentally disabled persons, organized under the identical laws which Respondent's home is organized under, is not a family even under a zoning definition of "family" which includes any individuals living together who are unrelated by birth or marriage as a single housekeeping unit. In any event, neither *Carroll v. City of Miami Beach* nor *Garcia v. Siffrin* employed the traditional legal construction of "family" which this Court has so often recognized. See *Moore v. City of East Cleveland, supra,* and *Smith v. Organization of Foster Families, supra.*

The total effect of the Ohio Court decision in this case is that contractual obligations have been impaired by subsequent State legislation. Private parties contracted to live on land which would be limited in use to traditional family uses. Now, the State of Ohio, through enforcement of subsequently enacted zoning regulations, has permitted less restrictive use of the property. The contractual obligations of the restrictive covenants have been impaired by State legislative action in direct conflict with Article I, Section 10 of the United States Constitution.

It should be added that the Court has authority to examine the law in effect at the origin of the restrictive covenant since the Ohio Courts did not examine such law.

The Court in *Larson v. State of South Dakota*, 278 U.S. 429 (1929) held that the Supreme Court, in determining the meaning of a contract and whether its obligations have been impaired by State legislation, must reach its conclusions independently of the State Court's judgment. See also *Georgia R. etc. Co. v. Decatur*, 262 U.S. 432 (1923).

2. THE PLACEMENT OF GROUP HOMES FOR DEVELOPMENTALLY DISABLED AND FOR OTHERS IN RESIDENTIAL CARE FACILITIES IS A RAPIDLY INCREASING ACTIVITY AND OF MONUMENTAL CONCERN TO NEIGHBORING PROPERTY OWNERS.

Throughout the United States over the last decade, a movement is under way to "deinstitutionalize" occupants of various State facilities. Included within the classes of people for whom deinstitutionalization is sought are the mentally handicapped, the insane, those addicted to drugs including alcohol and those convicted of crimes.

The theory with respect to such deinstitutionalization is that movement into a residential neighborhood will further the rehabilitation or habilitation of these individuals and will facilitate their integration or reintegration into society. Regardless of the merit of this proposition, such movement into residential areas is viewed with alarm by the residents therein. For years these residents believed themselves protected from such incursions by their public and private land use planning.

The protection of public land use planning through zoning has proven illusory. Definitions contained in zoning codes setting forth the meanings of family and the permissible uses in particular zones have changed drastically. This is the prerogative of representatives in the local communities *subject to constitutional restrictions.*

This has left property owners solely with the protection provided by restrictive covenants. These covenants are being drawn into question throughout the United States. See for example, *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); *Jayno Heights Landowners Association v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978); *Feely v. Birenbaum*, 554 S.W.2d 432 (Mo. App. 1977); *Berger v. State*, 71 N.J. 206 (1976); *J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64 (1981); *Crowley v. Knapp*, 94 Wis. 2d 42 (1980); *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. App. 1981); *State, etc. v. District Court, etc.*, 609 P.2d 245 (Mon. 1980); and *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981).

As demonstrated by the judicial activity in the United States, the impact of restrictive covenants upon group homes is a matter of great concern both to the proposed operators of the homes and their prospective neighbors. A variety of decisions have resulted, differing both as to decision and reasoning behind such decision. The difficulty in making the appropriate decision is typified by the sharp division which existed within the Supreme Court of the State of Wisconsin in the *Crowley* matter (*supra*). Petitioners respectfully submit that the dissenting views of the justices of that Court are much more persuasive than those of the majority.

CONCLUSION

The within action for which Petitioners request a writ of certiorari to issue involves significant constitutional issues pertaining to due process of law, just compensation for the taking of property rights and impairment of contractual rights. In addition, these issues are being presented to State Courts on a repeated basis for which no end appears in sight. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the lower Court.

Respectfully submitted,

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APPENDIX

OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT OF OHIO

(Dated December 15, 1982)

Case No. 10658

IN THE COURT OF APPEALS
STATE OF OHIO, SUMMIT COUNTY
NINTH DISTRICT

ANDREW BERES, *et al.*,
Plaintiffs-Appellants,

vs.

HOPE HOMES, INC., *et al.*,
Defendants-Appellees.

DECISION and JOURNAL ENTRY

[1] O'NEILL, J.

In April, 1946, an allotment known as the Hilltop Acres Allotment was recorded with the offices of the Summit County Recorder. The plat contained certain restrictions concerning the lots located within the allotment. Those restrictions, in pertinent part, provided as follows:

> "No business, commercial, sales, manufacturing or otherwise shall be conducted upon any lot. The premises shall be used for private residence purposes only, and only single-family residences shall be erected or maintained, and only one residence building upon each lot, except that on lots #4 and #19, one who is the

owner of an entire lot, may erect and maintain thereon, one additional single-family residence building if the same be located not less than 300 feet from the nearest highway."

In late 1980 and early 1981, the defendant, Hope Homes, Inc., entered into negotiations for the acquisition of a property owned by Mr. and Mrs. Fred Bochert, known as Lot #51 of the Hilltop Allotment, which has a mailing address of 102 N. Alling Road, Tallmadge, Ohio.

The express purpose for the acquisition of this house was the installation of a residential care facility. The facility was intended to house six (6) adult women with developmental disabilities ranging from moderate to severe mental retardation.

Prior to culmination of the negotiations, the officials responsible for the acquisition of this house had actual knowledge of the existence of the plat restrictions associated with this allotment. This is in addition to the constructive knowledge created through the recordation of the plat.

The home must comply with the licensure requirements [2] of the State of Ohio. In order to so comply as a "family home," it is necessary that the facility provide room and board, personal care, habilitation services and supervision in a family setting for not more than eight (8) persons with developmental disabilities. It is further necessary that the operator of such a facility maintain records of the medical treatment accorded the residents, record unusual occurrences such as accidents, injuries and seizures, keep a daily census of admissions, discharges and other releases and record the progress made on a ninety (90) day basis of the residents' individual habilitation plan. In order for this house to comply with the Ordinances of

the city of Tallmadge and with the licensure requirements with the state of Ohio, substantial changes in the heating, plumbing and electrical equipment will be necessary.

Hope Homes, Inc. will receive reimbursement for its expenses incurred in the care and treatment of the individuals occupying this facility. This reimbursement will include expenditures for the maintenance of the property, food for the residents and depreciation of the physical structure. It will also include salaries of the staff which are currently contemplated to include a regular manager and a week-end manager.

Under the Ordinances of the city of Tallmadge, the property is located within a R-3 residential district. The permissible uses in such a district are single-family residential dwellings and accessory uses provided such uses are incidental to the principal use and do not include any activity [3] conducted as a business. In addition, there are certain conditional permissible uses. These include institutions for medical care and rooming, lodging and boarding houses.

In February, 1981, Hope Homes, Inc. applied to the city of Tallmadge for Conditional Zoning Certificate. This permit was granted by the city of Tallmadge on the 9th day of April, 1981. From that adverse decision, appellants filed an appeal to the Court of Common Pleas, Summit County, Ohio. The appellants at that time also sought a declaratory judgment determining that the proposed facility would be violative of the plat restrictions.

This matter was heard by the trial court. At that time, plaintiffs sought to introduce evidence pertaining to the meaning of a family. The trial court sustained objections to the admissibility of this evidence. At trial, each of the plaintiffs further testified that part of the consideration

which they understood they were receiving from the acquisition of lots within the allotment was the ability to maintain their neighborhood as a single-family, private residential area without the incursion of other types of uses. All further testified that the value of their properties would be reduced as a result of the operation of this facility within their allotment.

On the 7th day of April, 1982, the trial court issued its decision determining the validity of the issuance of the Conditional Zoning Certificate and further determining that the proposed use of the premises located at 102 N. Alling Road, Tallmadge, Ohio, by the defendant, Hope Homes, Inc., was [4] a proper use of said premises and not in violation of any deed or allotment restrictions that cover the premises. From that adverse decision, the plaintiffs appealed to this court.

The first assignment of error argues that the trial court erred in determining that the proposed use of the premises by Hope Homes, Inc. did not violate the plat restrictions of Hilltop Acres Allotment.

In his opinion the trial judge interpreted and defined that portion of the deed restrictions which reads "The premises shall be used for private residence purposes only * * *." The trial judge separately defined the words *private* and *residence*. The court concluded that a residence use is a use where human beings make their permanent homes. The trial judge further defined *private* as a use "Intended for or restricted to the use of a particular person, group, or class." Appellant contends that the court should not have indulged this separated definition arguing that the Supreme Court has defined "private residence." In support of this contention, appellant refers to a portion of the dicta in the case of *Hunt v. Held*, 90 Ohio St. 280, at page 283, which states as follows:

"But is there any doubt as to the meaning of the words? The word 'residence,' as we view it, is equivalent to 'residential' and was used in contradistinction to 'business.' If a building is used as a place of abode and no business carried on it would be used for residence purposes only whether occupied by one family or a number of families. Counsel say that the words were intended to describe a type of building. We think not. The word 'residence' has reference to the use or mode of occupancy to which the building may be put. **[5]** If it had been intended that the building was to be for the use of one family only, words indicating such an intention would have been used, as is frequently done, such as 'a single residence,' 'a private residence,' 'a single dwelling house.' And it is to be noted that the common grantor here, in his deed to another lot owner in the subdivision, used the expression: 'This property is sold for single residence purposes only.'"

This dicta could be dispositive of this case but for the facts in this case. The inhabitants of the home in this case shall number six adult women with developmental disabilities. They shall live together as a unit. As a unit, they shall maintain the home, prepare meals and perform the various housekeeping chores. All of their housekeeping functions are performed under the guidance of a house parent who resides in the home. In spite of the fact that the relationship is not one of consanguinty, the residents are a single family unit. In *Carroll v. City of Miami Beach,* 198 So. 2d 643 (Fla. App. 1967), it was held that a group of young religious novices with a mother superior as their family head could properly live as a single family unit.

"Under the terms of the ordinance any number of persons *occupying the premises and living as a single*

housekeeping unit are entitled to the status of a family. There is no requirement that they be related by consanguinity or affinity." Carroll v. City of Miami Beach (1967), 198 So. 2d 643, 644.

The same reasoning can be drawn from the case of *Garcia v. Siffrin*, 63 Ohio St. 2d 259, wherein the Ohio Supreme Court recognized that a single housekeeping unit, a family, could be composed of "a group of indivduals who had joined together in these premises in order to primarily share [6] the rooming, dining and other facilities." The emphasis in such an instance may be placed upon the dwelling aspect of the unit, and upon the fact that those who are living within that structure are sharing and maintaining a household as a single unit." (p. 268). The United States Supreme Court has concluded that a "single family unit" can exist in the absence of consanguinity.

"In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. *Moore v. East Cleveland* (1977), 431 U.S. 494, 499." *Saunders v. Zoning Dept.* (1981), 66 Ohio St. 2d 259.

As long as the structure in question is maintained, physically, as a private residence and, as long as it is used and occupied by a group of persons living together as a single household unit, it, by existence and use, is not in violation of restrictions running with the land upon which it is located. It follows that as long as the use is devoted to a family household unit, such use is "private." It follows from the elements thereof that a household unit is in and of itself private as opposed to a multi-family use or an out and out commercial enterprise. Appellant argues that in spite of the family setting, the operators of this

home must provide annual accounting statements, provide reports, provide supervisors and care paid by the State and Federal Government. This is all true, but it is collateral to the family housekeeping unit. It does not make that unit non-private any more than the resident, engaged in business, who does his bookkeeping at home.

[7] The restrictions on the lot in question were recorded in the year 1946. The appellant called Donald Ramsey as a witness. Mr. Ramsey testified that in the year 1946, he was 19 years old. He was asked the following question:

> "Q. Can you recall back to the time that you were 19 years old as to your concept of a family?" (Tr. 84).

There was an objection and it was sustained. The sustention of this objection is the basis for appellants' second assignment of error. Mr. Ramsey was asked for *his* concept of a family not the community concept nor the concept of the drawer of the restriction nor of the concept held by parties to the restriction. In the determination of intent, Williston, Contracts, Sec. 617 (Rev. Ed.) states that the inquiry of the court should be: What was the meaning of the writing at the time and place it was made between persons of the kind or class who were parties to it? The court properly excluded Mr. Ramsey's opinion.

The home in question is located in an area which has been classified by the Council of the city of Tallmadge as an "R-3 Residential District." Permitted uses in such a district are single family residential dwellings, accessory non-business uses and signs. The ordinance also permits conditional permissible uses as follows:

"Sec. 412-3 Conditionally Permissible Uses

"The Planning Commission may issue conditional Zoning certificates for uses listed herein subject to the general regulations of Article VIII and to the specific requirements of Article VIII referred to below.

[8] "a. Public and parochial schools subject to Subsections 102, 103, 105, 107, 108, 115.

"b. Churches and other buildings for the purpose of religious worship subject to Subsections 102, 105, 109, 115, 118, 121.

"c. Public utilities right-of-ways and pertinent structures subject to Sections 102, 114, 115.

"d. Governmentally owned and/or operated parks, playgrounds and golf courses (except miniature) subject to Subsections 102, 103, 105, 106, 107, 121.

"e. Temporary buildings and uses for purposes incidental to construction work subject to Subsections 111, 112.

"f. Institutions for medical care—hospitals, clinics, sanitariums, convalescent homes, nursing homes, homes for the aged and philanthropic institutions subject to Subsections 102, 103, 105, 107, 109, 113, 115, 121." City of Tallmadge Ordinance 9-1969.

Appellant argues that the use of the property involved is not a "conditional use" and that the trial court erred in holding that the permit issued was valid.

At the outset, let us say that the intended use is a permitted use as a single family residential dwelling. Ordinance No. 9-1969, Sec. 201-32 defines a family as:

"* * * one or more persons occupying a premises and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, lodging house, or hotel, as herein defined."

In the instant case we have a single housekeeping unit residing in a one family dwelling.

Appellant argues that since the use of this home is not specified as a conditional use, the council had no [9] authority to grant a permit. In support, the appellant makes a very correct statement of the law. "Where a zoning ordinance limits the authority of the body to vary or modify the applications of the provisions of a zoning ordinance, actions authorizing greater variance or modification are illegal and contrary to law. *Zurow v. City of Cleveland*, 61 Ohio App. 2d 14." (Page 14 A & E). The use of this home was not a greater variance or modification than all of those specified in the zoning ordinance (Sec. 412-2-3).

Judgment affirmed.

BELL, *P.J.*, concurs,

DONOFRIO, *J.*, concurs.

APPROVED:

/s/ JOSEPH E. O'NEILL

Judge

JUDGMENT ENTRY OF THE COMMON PLEAS COURT FOR SUMMIT COUNTY

Case No. CV 81 4 1056

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

ANDREW BERES, *et al.*,
Plaintiffs,

vs.

HOPE HOMES, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came on to be heard by the Court, without the intervention of a jury, and upon consideration of the evidence and the briefs, and based upon the findings of fact and conclusions of law entered by this Court on February 18, 1982, it is ordered that:

1. The conditional zoning ordinance of the City of Tallmadge, Ohio enacted on the 9th day of April, 1981, granting a conditional zoning certificate to Defendant Hope Homes, Inc. and being Ordinance Number 291981 is hereby declared to be a reasonable exercise of discretion based upon the City's zoning provisions. The order, adjudication and/or decision of the Tallmadge City Council, represented by said Ordinance, is hereby affirmed.

2. The issues raised by Plaintiffs with regard to an administrative appeal from the actions of the Tallmadge City Council have been rendered moot by virtue of subsequent case law governing the disputed language and the above referred to appeal is dismissed as moot.

3. That the proposed use of the premises located at 102 North Alling Road, Tallmadge, Ohio by Defendant Hope Homes, [2] Inc., is hereby declared to be a proper use of said premises and not in violation of any deed or allotment restrictions that cover the premises.

4. The preliminary injunction instituted by this Court against Defendants, the City of Tallmadge and Hope Homes, Inc., is hereby vacated and set aside.

5. That Plaintiffs pay all costs of this matter.

6. That the Court specifically reserves to it the issue of the assessment of damages against Plaintiffs arising from the unwarranted preliminary injunction obtained by Plaintiffs.

7. The Court expressly determines that pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure there is no just reason for delay in entering final judgment upon all issues in this matter with the exception of the issue of damages arising from the unwarranted injunction.

WILLIAM R. BAIRD
Judge

ORDER OF THE OHIO SUPREME COURT DENYING CERTIORARI

(Dated June 8, 1983)

No. 83-235

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ANDREW BERES *et al.*,
Appellants,

vs.

HOPE HOMES, INC., *et al.*,
Appellees.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR SUMMIT COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

LOCHER and J.P. CELEBREZZE, *JJ.*, not participating.

ORDER OF THE OHIO SUPREME COURT DISMISSING APPEAL

(Dated June 8, 1983)

No. 83-235

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ANDREW BERES *et al.*,
Appellants,

vs.

HOPE HOMES, INC., *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

OHIO REVISED CODE

5123.18 Contracts for residential services

(A) Notwithstanding Chapter 340. and sections 5119.61, 5119.62, 5123.02, 5123.17, 5126.08, and 5126.12 of the Revised Code, the director of the department of mental retardation and developmental disabilities may enter into a written contract with a private organization, a nonprofit corporation, or a local public agency for the provision of services at a reasonable cost, including residence, supervision, and habilitation services, for any mentally retarded person residing in a state-operated facility or eligible for admission to such a state-operated facility, who is placed by the director in a facility operated by such an organization, corporation, or agency, or for the reasonable costs of beginning the operation of such a facility during a period not to exceed ninety days.

Placement in a facility shall be in lieu of institutional care to best meet the needs of the person so placed and shall be certified as such by the director of the department of mental retardation and developmental disabilities. The reimbursement or fee for services provided to such a person shall be based on a "prospective rate." "Prospective rate" means a predetermined, reasonable cost-related rate calculated by the department of mental retardation and developmental disabilities for each facility on the basis of either a cost report filed by the facility for a prior cost reporting period or the ceiling rate for the particular category of cost, whichever is less. The rate so established is not subject to subsequent or retroactive settlement based upon subsequent cost reports, unless it is determined by the department that the cost report on which the rate was based is inaccurate or substandard care is being provided.

Facilities do not qualify for payment unless they submit to the department cost reports at least annually, for the period ending the thirty-first day of December of each year. The reports shall be submitted on cost reporting forms prescribed by the department and in accordance with rules adopted by the department. Facilities participating in the purchase of service program shall utilize a uniform chart of accounts approved by the department for the purpose of cost reporting. No item of cost that is paid to the contracting entity by a school district or a governmental agency, or by a gift or grant from any source, shall be included in payments made pursuant to this section.

(B) Prior to entering into a contractual agreement for the provision of services as mentioned herein, the director of the department of mental retardation and developmental disabilities shall advise the county board of mental retardation and developmental disabilities of the county in which the facility of placement is located relative to the contractor offering to provide residential services and other supportive services to be provided in that county for mentally retarded persons.

(C) Notwithstanding section 5123.19 of the Revised Code, the director of the department of mental retardation and developmental disabilities shall adopt and promulgate rules to implement this section. Except as otherwise provided in this section, such rules shall be adopted in accordance with section 111.15 of the Revised Code. Such rules shall include standards for the provision of facilities and services, including maximum allowable per diem rates and maximum cost ceilings for each category of cost included in the required cost reports. The factors used to establish the reasonableness of expenditures which comprise the prospective rate shall be established by rules

adopted by the director pursuant to Chapter 119. of the Revised Code.

(D) Facilities operated by such entities must meet requirements for licensing and certification by the appropriate state agency.

(E) In arriving at a per diem rate to be paid under the contract, based on the actual cost, such cost may include salaries, expenses for operation, rent, lease, and maintenance and services as authorized under rules. Excluded from consideration in arriving at a per diem rate are costs for services provided without charge to the contractor by a public agency.

(F) In order to ensure that the per diem rate accurately reflects actual reimbursible costs, the department of mental retardation and developmental disabilities may audit or cause an audit to be made of operating costs of the facilities and services contracted for. The department shall use funds appropriated for carrying out the provisions of this section to employ persons to conduct financial audits of those private organizations, nonprofit corporations, or local public agencies contracting with the department under this section that the department selects for audit. A contract for such auditing services shall be approved by the auditor of state. The auditor shall receive a copy of all audit reports made pursuant to this section. There is hereby created in the state special revenue fund the purchase of service special account. Moneys recovered as a result of audits shall be deposited into the purchase of service special account and disbursed in the same manner as funds appropriated for carrying out the provisions of this section.

(G) The mentally retarded person, liable relatives, and guardians of mentally retarded persons placed in fa-

cilities contracted for by the department of mental retardation and developmental disabilities shall pay support charges in accordance with sections 5121.03 to 5121.07 of the Revised Code.

(H) Reimbursement for services provided in this section under contract agreements shall be made by the department of mental retardation and developmental disabilities at the times agreed upon by the director of mental retardation and developmental disabilities and the contractor.

5123.19 Definitions; licensing residential facilities for those with developmental disabilities; local powers affected

(A) As used in this section and section 5123.20 of the Revised Code:

(1) "Residential facility" means a home or facility in which a person with a developmental disability resides, except a home subject to Chapter 3721. of the Revised Code or the home of a relative or legal guardian in which a person with a developmental disability resides.

(2) "Developmental disability" means a disability that originated before the attainment of eighteen years of age and can be expected to continue indefinitely, constitutes a substantial handicap to the person's ability to function normally in society, and is attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other condition found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior or requires similar treatment and services.

(3) "Family home" means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disabilities.

(4) "Group home" means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for at least nine but not more than sixteen persons with developmental disabilities.

(5) "Political subdivision" means a municipal corporation, county, or township.

(B) Every person desiring to operate a residential facility shall apply for licensure of the facility to the director of the department of mental retardation and developmental disabilities.

(C) The director of the department of mental retardation and developmental disabilities shall license and inspect the operation of residential facilities and may renew and revoke such licenses. A license is valid for one year from the date it is issued or renewed. Before issuing or renewing a license, the director of the departmnt or his designee shall inspect each residential facility for which application is made. The director or his designee may make additional inspections of a licensed residential facility. The director shall not issue or renew and may revoke the license of a residential facility not operated in compliance with this section and rules adopted thereunder. The director shall issue or renew the license of a facility for which proper application is made if the facility is operated in compliance with this section and rules adopted thereunder.

No license for a residential facility shall be issued or renewed nor the location of a license be transferred by the director until he notifies, by certified mail, return receipt requested, or by personal service, the clerk of the legislative authority of the municipal corporation if the location of the residential facility is within a municipal corpora-

tion, or the clerk of the board of county commissioners and clerk of the board of township trustees if the residential facility is located in unincorporated territory and any local zoning or planning board having jurisdiction within the territory in which the residential facility is located; and an opportunity is provided to the general public, officials or employees of the municipal corporation or county and township and the appropriate local zoning or planning board, which officials and employees shall be designated by the chief executive officer or legislative authority of the municipal corporation, the board of county commissioners or township trustees or the appropriate local zoning or planning board, to object or to comment upon the advisability of the issuance, renewal or transfer of location of the license in writing. With respect to an application for issuance of a license or transfer of the location of a license, notice to the general public of such opportunity to object or to comment in writing shall be given by the chief by one publication in one or more newspapers of general circulation in the municipal corporation or township in which the residential facility is proposed to be located. Such notice shall be given within seven days after notification of the clerk of such municipal corporation or township in accordance with this section. The notice shall indicate at least the following: the address of the proposed facility; the number of residents with developmental disabilities which the facility is proposed to accommodate; the opportunity and deadline for written public comment and the address of the person to whom such comment is to be directed.

The written objections or comments shall be made to the director not later than forty-five days after the director notifies the appropriate local governmental officials or bodies. At the time of the issuance or renewal of the license the director shall make written findings concerning

the objections or comments and his decision on the issuance or renewal of the license. Within five days after issuing a license for a residential facility, the director shall send a written notice of the issuance by certified mail, return receipt requested, to the legislative authority of the political subdivision where the facility is located. Each notice from the director shall specify the address and location of the facility and whether it is a family home, group home, or other type of facility. Failure of the director to send the required notice after the issuance of the license or failure to receive the notice does not invalidate a license.

The director shall adopt and may amend and rescind rules establishing procedures and fees for issuing and renewing licenses and regulating the operation of residential facilities. Adoption, amendment, and rescission of rules, and appeals from orders affecting issuance, renewal, and revocation of licenses under this section, are governed by Chapter 119. of the Revised Code.

(D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are uniformly imposed upon all single-family residences within the district or zone.

(E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision, except that a political subdivision that has enacted a zoning ordinance or resolution establishing planned unit development districts may exclude group homes from such districts, and a political subdivision that has enacted a zoning ordinance or resolu-

tion may regulate group homes in multiple-family residential districts or zones as a conditionally permitted use or special exception, in either case, under reasonable and specific standards and conditions set out in the zoning ordinance or resolution to:

(1) Require the architectural design and site layout of the home and the location, nature, and height of any walls, screens, and fences to be compatible with adjoining land uses and the residential character of the neighborhood;

(2) Require compliance with yard, parking, and sign regulation;

(3) Limit excessive concentration of homes.

(F) This section does not prohibit a political subdivision from applying to residential facilities nondiscriminatory regulations requiring compliance with health, fire, and safety regulations and building standards and regulations.

(G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modification.